No. 14188

United States
COURT OF APPEALS
for the Ninth Circuit

BART McKENNEY and MARIE McKENNEY, individually and as co-partners doing business under the name of McKenney Logging Company, *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

EINAR GLASER, DOROTHY GLASER and McKENNEY LOGGING CORPORATION, a corporation *Appellants,*

vs.

BUFFELEN MANUFACTURING CO., a corporation, *Appellee.*

REPLY BRIEF OF APPELLANTS BART McKENNEY and MARIE McKENNEY, individually and as co-partners in McKenney Logging Company

Appeals from the United States District Court for the District of Oregon.

HONORABLE JAMES ALGER FEE, Chief Judge.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-54

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A. ON APPELLEE'S PRELIMINARY STATEMENT OF THE CASE

As stated by Appellee further briefs will be filed in this case by the other Appellants. Since the judgment and decree is jointly against the other Appellants, Einar Glaser and Dorothy Glaser, and these Appellants, Bart

McKenney and Marie McKenney, the Appellee has no claim, if there be any, to waiver on Specifications VII to XIII inclusive, until after the remaining briefs have been filed. It may be anticipated that all of the Specifications of Error in Appellants McKenneys' brief with others will be amply argued and supported by authorities, and any objections now urged against Specifications VI and XIII by the Appellees be removed in such further and later briefs.

B. ON APPELLEE'S CORRECTION OF McKENNEYS' STATEMENT OF THE CASE

The apparent typographical error in the amount on page 8 of our opening brief to which the Appellee calls attention is by such correction now rightly stated to be $2,409,991.88 as the amount Buffelen paid the partners in the purchase from the partners of 55,546,171 feet of logs under the contract January 8, 1948, Exhibit 1.

With respect to Appellee's statement on page 4 of its brief, that "The partners, however, prepaid these stumpage charges in the course of their earlier deliveries," we perceive in such attempted correction to McKenney's Statement of the Case, some possible hint of a difference between "prepayment of stumpage charges" and the statements of Appellants McKenneys' that payment was made in full by the partnership for the timber standing in the name of Buffelen.

Since this Appellant had pointed out repeatedly in its opening brief (p. 12 of McK. Brief and at other pages) that an admitted fact in the case was that "the

partnership had repaid the Lumber Company, Buffelen, all of its advances, including Buffelen's advances for purchase of timber lands and cutting rights covered by the contract (Exhibit 1, Pragraph IV, Pre-Trial Order, Agreed Facts, Tr. 16) and since the Appellee is confronted with a factual situation where the partnership gets all of the money for timber cut from such lands, (including the lands standing in the name of Buffelen) whether Buffelen purchase such timber or not, it is understandable that Appellee may seek for more convenient words of expression. The unyielding and relentless fact is that the McKenney partnership had bought and paid for all of the timber covered by Exhibit 1, which is the contract of January 8th, 1948 as supplemented.

Appellee asserts (p. 5 Appellee's Brief) "The McKenneys do not deny liability for the corporation's acts." Appellants McKenney most certainly do and assert that they cannot be held liable for the acts of the McKenney Logging Corporation.

ON APPELLEE'S ANSWERS TO SPECIFICATIONS OF ERROR I AND II

Counsel attempts persistently by argument to expand the precise language on the face of Exhibits 19a, 19b, and 19c. On page 8 of its brief by the device of tying-in Exhibit 22 in the same sequence as Exhibits 19a, 19b, and 19c, seeks to gain benefit for Exhibits 19a, 19b, and 19c, from the testimony of witness Miles when Exhibit 22 was admitted to which Appellee is not en-

titled. There is not a syllable of testimony concerning Exhibits 19a, b and c, on page 462 of the Transcript, and yet the first sentence on page 8 of Appellee's brief reads as follows:

> "EXHIBITS 19a, 19b, 19c and 22 were prepared directly from the books of the company to show the financial performance of the mill from July 1, 1948 to October 31, 1952 (Tr. pp. 200-201, 462). They show average monthly earnings of $9,000.00 during the fiscal year ending June 30, 1950 and $6,000 in the following year. They are based upon the amount of actual operating time and accurately report costs incurred in the operation of the mill (Tr. pp. 481-482)."

There is not a syllable of testimony with respect to Exhibits 19a, 19b, and 19c, on pages 481-482 of the Transcript of Record.

The plain fact is that Exhibits 19a, 19b, and 19c stand by themselves without any aid from witness Miles testimony when they were admitted. Such testimony is reported on pages 200-205 of the transcript and there is no other or additional testimony with respect to Exhibits 19a, 19b, and 19c. We said in our opening brief that witness Miles' testimony added nothing to the documents themselves and this has not ben controverted.

We stress the matter here for our Specification of Error No. 1 presents an irreparable defect in Appellee's case. The defect is a glaring omission and has been created by an attempt by Appellee to prove loss of profits in a tremendous amount by the introduction of Exhibits (19a, 19b, and 19c) as SUBSTANTIVE EVIDENCE which exhibits are wholly inadequate and

the inadequacy thereof is apparent on the face of such exhibits. It is a trial error of omission and leaves the Appellee without any evidence on the most important and crucial point in the whole part of the case pertaining to loss of profits.

Counsel for Appellee seeks by the methods in its brief we have hereinabove revealed to avoid the catastrophy which now surrounds them arising out of the situation produced as we have just stated. We find on page 24 of Appellee's brief: with respect to Exhibits 19a, 19b, 19c, the same tie-in for in sequence again we find "and 22". The vehicle has been so provided for this statement "The transfers of lumber to all purchasers are reported as actual sales at specified prices." Where is the evidence to support that statement with respect to Exhibits 19a, b, and c? There is nothing on Exhibits 19b and 19c to show that any transfers were reported as actual sales at specified prices. As stated in our opening brief, sales as shown by Exhibit 19b say "Sold to Others," 3,850,380 feet of lumber at $32.55 per thousand which cost $46.92 to produce and Exhibit 19c likewise shows "Sold to Others," 2,841,893 feet of lumber at $31.31 per thousand which cost $47.55 to produce. But not a word appears therein as sales of the rest of the millions of feet of lumber.

Exhibits 19b and 19c (these two are relied upon to support use value by the Appellee, for Exhibit 19a shows a loss) state that large quantities of lumber were transferred to Hardwood-Tacoma; Door Factory-Tacoma and Sawmill-Tacoma, at $160; $79.23 and $28.96 re-

spectively, and on 19b and at $19.86; 119.08 respectively and to PM No. 3 Tacoma at $100.

We query, how could such transfers be sales? Buffelen would thereby be making sales to themselves, which of course, is an utter impossibility. And if Buffelen had made sales to subsidiaries, which is not claimed, it is submitted that the statements of counsel could not even then take the place of testimony that market prices were used in making up the Batterson Cost Reports Exhibits 19a, 19b, and 19c.

On page 28 of Appellee's brief counsel persists in calling the transfers, sales. It is there stated: "No reason is suggested for selling the mill's production at any price other than the market, and there is nothing to suggest that any other price was used." The fact is as above stated there were no sales of any lumber except that stated "Sold to others" on the exhibits 19a, b, and c. and such sales according to the exhibits were at a substantial loss.

Where is the proof that the Batterson Mill ever made a profit? It is so obvious that Exhibit 22 can be of no avail to plaintiff until plaintiff has first shown that the Batterson Mill made a profit, that the mere mention of it here may appear superfluous. Appellees' theory of use value is wholly dependent upon past performance. The Oregon Supreme Court says "actual past profits" in *Williams v. Island Milling Co.* cited by Appellee in its brief at page 17. We think it might be well to interpolate a part of the omitted portion which omission has been appropriately and duly indicated by asterisks in quoted

portion of *Williams v. Island Milling Co.* in Appellee's brief:

> "Under the rule adopted by the trial court, however, the damages were to be determined on an estimate of the future profits the defendant might have realized from a sale of the mill products, had the mill been operated to its full guaranteed capacity, basing the same upon a net profit of seventy-five cents per barrel of flour, without regard to what the past experience of the defendant had shown the actual value of the use of the property to be, and was, we think, therefore, too speculative and uncertain to form a basis for estimating damages, when other and more certain data were on hand. (citations omitted by us)."

For purpose of brevity we have omitted as above stated a portion of the part which was omitted by Appellee in its quotation from the case.

All claims made by Appellee for the testimony of their witness and co-adventurer Gould in its answering brief have been decided against Appellee by the Oregon Supreme Court in *Randles v. Nickum & Kelly Sand & Gravel Co.*, 169 Or. 284, 127 P. 2d 347, discussed at some length in our brief (pp. 20-21).

REPLYING TO APPELLEE'S ANSWERS ON RECOVERY OF EARNINGS LOST

First we wish to show that the Oregon rule in this regard is not contrary to that set forth by the Supreme Court of Washington in *National School Studios, Inc. v. Superior School Photo Service, Inc.*, 40 Wash 2d 263, 242 P. 2d 756 (1952), discussed in our opening brief at

page 22. It should be noted that the most recent Oregon case discussed or cited by Appellee in its brief on this point is 149 Ore. 388, at page 14 of Appellee's brief. Since then we find *Stubblefield v. Montgomery Ward & Co.,* 163 Or. 432, 96 P. 2d 774, 98 P. 2d 14 (1940), and others including the rather recent case of *Carlson v. Steiner,* 189 Or. 256, 220 P. 2d 100 (1950). In the Washington case, *National Studios, inc. v. Superior School Photo Service, Inc.,* supra, the Court among other authorities cites (at page 763 of 242 P. 2d) the Restatement, Law of Contracts, 515, Sec 331, in support of the trial court's view, which view we discussed at page 22 of our brief.

The Oregon Supreme Court speaking through Mr. Justice Rossman in *Stubblefield v. Montgomery Ward & Co.,* supra, said (at page 780 of 96 P. 2d) (we quote only in part):

> "The measure to be employed in determining the amount of the consequential damages in this case is well established, we believe. From Restatement of the Law, Contracts, Section 331, we quote: 'Damages are recoverable for losses caused or for profits and other gains prevented by breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.' The plaintiffs do not ask that the consequential damages be measured by the anticipated profits of the hotel, and hence we shall pass on to the next paragraph of Section 331, which states the measure to be employed where the profit yardstick is not available; but before passing on we pause to observe again that the evidence must afford 'A SUFFICIENT BASIS FOR ESTIMATING' the amount of damages * * *." (Capitalization ours).

Mr. Justice Rossman also discusses at page 781, *Williams v. Island City Milling Co.,* 25 Or. 573, 37 P. 49, which is one of the cases relied upon by Appellee.

In *Carlson v. Steiner,* supra, Mr. Justice Brand speaking for the Oregon Supreme Court quotes the same portion of Section 331 of Restatement of Contracts which Mr. Justice Rossman quoted in *Stubblefield v. Montgomery Ward & Co.,* supra, which we have hereinabove set out, and at page 104 of 220 P. 2d says (we quote only in part) with reference to said Section 331:

> "The rule thus stated is cited with approval in Stubblefield et al. v. Montgomery Ward & Co.,, et al., 163 Or. 432, 96 P. 2d 774, 98 P. 2d 14, 125 A.L.R. 1228, 1240, and see Beisell, et ux. v. Wood, et ux., 182 Or. 66, 185 P. 2d 570. We have no doubt concerning the correctness of the Stubblefield decision, but the issues thereof do not resemble those in the case at bar. * * *"

The Oregon Court then discusses the other portions of Section 331 of the Restatement and quotes from the section thereof affording greater leeway in certain cases, and discusses, or at least cites, most of the cases cited on this point by Appellees; and also cites *Randles, et al. v. Nickum & Kelley Sand & Gravel Co.,* 169 Or. 284, discussed in Appellant McKenney's brief. Mr. Justice Brand in *Carlson v. Steiner* after stating that the defendant argued that the plaintiff suffered no damage, or if damage was suffered, that the evidence thereof was too uncertain to permit of assessment in money, observed in part (p. 104 at 220 P. 2d):

> "If the question were properly before us, it would present a difficult problem because the case conceededly rests close to the borderline. * * *"

The defendants, appellants, having attempted to raise the objection concerning the speculative character of the damages awarded to the effect that the judgment was not supported by the evidence, and not having raised the question in the manner required by Oregon statute, which requires objection to findings of fact or the request for other findings in a case tried by the court, Mr. Justice Brand held that the question as to the alleged speculative character of the damages or the measure thereof was not before the court for review. The court cited among other cases the recent case of *Beisell v. Wood,* 182 Or. 66, 185 P. 2d 570. We read in that case the following statement by Mr. Justice Hay (at page 574, 185 P. 2d):

> "Assuming, without deciding, that evidence of loss of time and expense involved in this connection was admissible under the allegations of general damages, we are of the opinion that the evidence offered will not support an award of damages. While the inconvenience was no doubt considerable, there was no proof whatever of the time consumed or the expense involved, or of the value thereof in terms of money, factors which were essential to enable the court to make an award of monetary compensation therefor. As a general rule, compensation in money must be fixed according to some standard which will admeasure the loss in terms of pecuniary value, *if this can be done, and the measure applied must be a real and tangible one.*" (Italics ours, and we have omitted citations.)

The court continued:

> "We think that the value of the time consumed and expenses involved herein were matters that were susceptible of proof within a reasonable degree of

> certainty. The court cannot base an award of damages upon mere speculation, conjecture, or surmise. (citations again omitted). Under the circumstances, nominal damages only may be awarded." (Citations omitted.)

In view of all of the foregoing by the Oregon Supreme Court can it be said that the Washington rule is less liberal than the Oregon rule, or as Appellee has asserted that the Oregon rule in "this regard" is contrary to the Washington case we have cited. Appellee would have this Court believe that the Washington rule requires exact proof. The Washington rule requires the same as the Oregon rule, and that is an award of damages cannot be based upon mere speculation, conjecture, or surmise. *Pedro v. Vey,* 150 Or. 415, cited by Appellee is not to the contrary.

The finding in the instant case is clearly erroneous. Both an obvious error of law and a mistake of fact has been made by the District Court. There is no substantial evidence to support the finding of $118,000 loss of profits. *U. S. v. U. S. Gypsum Co.,* 333 U.S. 364 at p. 394, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

We might point out here that Appellee in (d) on page 23 of its brief, refers to Exhibits 19a, 19b, and 19c in connection with Average monthly earnings and in E, on page 19 of its brief, say that the use value of the mill for 11 months (December 1,1951 - October 31, 1952), calculated from the same exhibits was $82,500.00.

For the sake of accuracy let us now refer to—

Exhibit 19a, which on its face allegedly states Book Loss	$ 6,132.62
Exhibit 19b, which on its face allegedly states Book Profit	113,309.75
Exhibit 19c, which on its face allegedly states Book Profit	100,229.57
	$207,406.70
The average monthly sum for the 36 month period covered by Exhibits 19a, b, and c is	$ 5,761.00

We assume that Appellee has divided the sum of $113,309,75 from Exhibit 19b plus the sum of $100,-229.57 from Exhibit 19c by 24 and thereby arrived at $82,500.00 for the eleven month period. But $113,309.75 plus $100,229.57 divided by 24 and multiplied by eleven does not produce $82,500.00 but does result in a sum of $97,112.00.

Since Appellee states that Exhibits 19a, 19b, and 19c, and 22 are wholly sufficient and convincing to support the finding of the trial court, we suggest that Appellee explain why the court has not taken the 36 month period as we have indicated above, so that the 11 month period for which Appellee gets an arithmetical result of $82,500.00 should not have been stated as 11 x $5,761 or $63,371.00. Thereby it would seem that by adding the alleged loss of $30,533 to $63,371 which totals $93,904, and taking the $93,904 from the $118,000, there would have been left $24,906, a much more tidy sum to be made up in the manner Appellee's counsel has done by grasping in the record for the fact that Buffelen had a couple of scouts reconnoitering the great forests of Tillamook County, Oregon in an attempt to find #2 Fir Saw logs.

The foregoing we submit presents a graphic picture of what happens when the field of speculation, conjecture and surmise is entered upon to support a judgment of $118,000 for loss of profits. Appellee states to this Court in its brief at page 19, that the exhibits are wholly sufficient and convincing evidence to support the finding of the trial court and then proceeds to attempt by arithmetic to show that it is so, which of course, it has not done as we have so clearly demonstrated by the foregoing. We say that the Exhibits 19a, 19b and 19c prove nothing in the case. Borrowing from the language of wisdom of the Oregon Supreme Court in the loss of profits cases, *Randles v. Nickum & Kelley Sand & Gravel Co.,* it may be safely said that to sanction the recovery for damages in this case for loss of profits for which there is no firmer foundation than was provided here would be practically to remove all the safeguards which the law has wisely thrown around claims of this character.

REPLYING TO SECTION IV OF APPELLEE'S BRIEF ENTITLED "THE COURT PROPERLY ENTERED JUDGMENT AGAINST THE PARTNERSHIP FOR THE VALUE OF TIMBER CUT AND REMOVED FROM APPELLEE'S LAND BY THE CORPORATION (SPECIFICATION OF ERROR V)

To the assertion by the Appellee that Appellants McKenney cannot and do not contend that they were entitled to anything for timber removed by the corporation

and sold to third persons, we suppose that Appellee wants to have this Court conclude that if Appellants McKenney reply that they have the right to collect the $50,000 from the corporation, then the partnership is out nothing, if and when it collects that sum from the corporation. But in our opening brief we asserted time and again that regardless of whether Buffelen bought the logs or not, the partnership would get $50,000 for the stumpage. Clearly the Corporation was and is liable to the partnership for the market value of the stumpage, which it has been testified is worth $50,000. It is undisputed that all of the stumpage standing in Buffelen's name has been paid for by the McKenney partnership.

The McKenney partnership can and does contend that they are entitled to the $50,000.

CONCLUSION

We do not understand what Appellee claims for the citation to 53 L.R.A. 33, at pp. 71-72, in the conclusion of its brief. The purpose thereof was not stated.

The judgment and decree herein should be reversed and a new trial granted.

Respectfully submitted,

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